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In the Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL.,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

MARK RIENZI
ERIC RASSBACH
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
mrienzi@becketfund.org
erassbach@becketfund.org

EUGENE VOLOKH
Counsel of Record
SCOTT & CYAN BANISTER AMICUS BRIEF CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amicus Curiae

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

1. Is Texas's specialty license plate program either a limited public forum or a nonpublic forum, in either of which Texas must maintain viewpoint neutrality?

2. Has Texas remained viewpoint-neutral even though it has approved every other proposed license plate design, except the one at issue here, which Texas rejected because of its message?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm dedicated to the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund has often advocated both as counsel and as *amicus curiae* for equal access to government funding and facilities for religious organizations. The Becket Fund does not agree with or support the use of the Confederate flag, on license plates or anywhere else; the Becket Fund opposes all racist messages. But the Becket Fund believes that adopting Texas's theory in this case—a theory under which governments could have broad authority to discriminate based on viewpoint in many programs—would give governments unprecedented and unwarranted leverage over religious groups' expression of their beliefs.

SUMMARY OF ARGUMENT

This case is about more than license plates and Confederate flags. Many government programs let private speakers access government resources—charitable tax exemptions, student loans and grants,

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. The parties have consented to this filing.

meeting spaces for student organizations, the postal service, and more. In creating such programs, the government "does not itself speak or subsidize [the] transmittal of a message it favors but instead [encourages] a diversity of views from private speakers." *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 834 (1995). If the government were then permitted to exclude certain viewpoints, it would acquire tremendous power to direct public debate and the exchange of ideas.

Texas argues that the speech here is government speech, not private speech. But this argument is an excellent illustration of the "legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint." *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 473 (2009).

The Texas specialty license plate program contains more than 80 plates designed and submitted by private organizations. The viewpoints expressed include, among other things, boosterism for the University of Oklahoma and the Louisiana State University; advertisements for Mighty Fine Burgers, Freebirds Burritos, Dr. Pepper soda, and Re/Max real estate; and the statement that the driver would "Rather be Golfing."

All these license plates can be treated as "government speech" only if the simple fact of a government benefit (such as the one in *Rosenberger*) itself makes the speech into government speech—which is to say, only if the requirement of viewpoint-neutrality even in nonpublic fora and limited public fora is rejected.

To be sure, Texas states that it "'effectively control[s]' and exercises 'final approval authority' over the design." Petr. Br. 14 (*citing Summum*, 555 U.S. at 473). But Texas had never once rejected a design application before this case. Likewise, Texas states that a design may be rejected if it "*might* be offensive to *any* member of the public," Tex. Transp. Code § 504.801(c) (emphases added). Yet this limitation has also been largely abandoned by Texas. Surely designs featuring the Texas Trophy Hunters Association, "Choose Life," or "One State Under God" (with three crosses) *might* be offensive to *some* member of the public, yet such designs are currently available to any Texas motorist.

Nor can this case be distinguished from *Rosenberger* and the other "forum" cases on the grounds that the government must physically print the license plate. Printing and distributing a license plate is not materially different from providing physical space for speech (*Widmar* v. *Vincent*, 454 U.S. 263, 268 (1981), transporting speech through an internal mail system (*Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 47-49 (1983), and subsidizing speech (as in *Rosenberger* or in *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983)).

Indeed, this Court held in *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985), that viewpoint neutrality is required in the Combined Federal Campaign, which raises charitable contributions from federal employees. Yet there the government itself printed statements of private organizations in the Campaign pamphlets. And this Court's ruling in *Lehman* v. *City of Shaker Heights*,

418 U.S. 298, 303 (1974), requires viewpoint neutrality when the government sells advertising space on city buses, *see R.A.V.* v. *City of St. Paul, Minn.*, 505 U.S. 377, 390 n.6 (1992), and thus has to display, mount, and likely print the ads, either itself or via a contractor.

ARGUMENT

I. Allowing exclusion of certain viewpoints from programs supporting private speech would give the government broad power to control public debate

Many government programs grant private speakers access to government resources. The charitable tax exemption is one example: this Court held in *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983), that the exemption is "a form of subsidy that is administered through the tax system."

Government-subsidized student grants and loans are another example. This Court has held that those programs provide benefits to universities as well as to students, because there is no "substantive difference between direct institutional assistance and aid received by a school through its students." *Grove City College* v. *Bell*, 465 U.S. 555, 564 (1984). Other familiar examples include meeting spaces for student groups, *Widmar*, 454 U.S. at 265, support for student newspapers, *Rosenberger*, 515 U.S. at 821, and more.

And this Court has rightly concluded that the government must let speakers participate in such programs without viewpoint discrimination. Thus, in *Regan*, this Court upheld a tax exemption provision

because the government had not discriminated "in its subsidies in such a way as to 'aim[] at the suppression of dangerous ideas.'" 461 U.S. at 548 (internal citation and internal quotation marks omitted). In *Rosenberger*, this Court likewise held that *Regan* "reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits." 515 U.S. at 834.

In *Widmar*, *Rosenberger*, and, most recently, *Good News Club* v. *Milford Central School*, 533 U.S. 98, 102 (2001), this Court made clear that excluding religious messages from access to space or funding provided by a public school or university was unconstitutional viewpoint discrimination. And given that federal, state, and local governments now spend over 35% of the nation's Gross Domestic Product every year,[2] preserving this viewpoint neutrality mandate is necessary to protect public debate and the marketplace of ideas from undue governmental distortion.

Texas's specialty license plate program is akin to the tax exemption in *Regan*, the funding program in *Rosenberger*, and the access to meeting spaces in *Widmar* and *Good News Club*. In letting non-profit organizations design their own license plates, Texas has invited private organizations to express varied, diverse, and often conflicting messages on official Texas license plates. Indeed, Texas has accepted 89 specialty license plate applications from private organizations, J.A. 20, far more than the fifteen news-

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[2] *See* Office of Management & Budget, *Historical Tables* tbls. 1.2 & 15.2 (2011 data), http://www.whitehouse.gov/omb/budget/Historicals.

papers funded in *Rosenberger*, 515 U.S. at 825. And it has invited Texas drivers to choose from these privately designed plates to "give [their] vehicle a personal touch."[3]

These messages include support not just for Texas and Texas institutions, but also for major rivals of Texas institutions, such as the University of Oklahoma and the Louisiana State University. They include support for commercial products, such as Mighty Fine Burgers, Freebirds Burritos, Dr. Pepper soda, and Re/Max real estate. They include support for hobbies ("Rather be Golfing" and "Texas Trophy Hunters Association"). They include support for NASCAR drivers Dale Earnhardt and Jeff Gordon. It is hard to see how any of these designs promote an official view of the Texas government.

When the government grants members of the public such broad access to express their own views, the government "does not itself speak or subsidize [the] transmittal of a message it favors," but instead encourages "a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. And *Rosenberger* and the other cases make clear that this sort of program may not then selectively exclude viewpoints that the government or the public views as offensive.

Texas argues that the specialty license plate program is not governed by these precedents because it is "government speech." As the heading to Part I.A of Texas's brief argues, "the government-speech doctrine permits states to limit speech that occurs with-

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[3] Texas Dep't of Motor Vehicles, *License Plates*, http://txdmv.gov/motorista/license-plates (last visited Feb. 1, 2015).

in the scope of a government-created program," Pet. Br. 17 (capitals changed to lowercase).

Yet the logic of that argument would essentially overturn the cases discussed above. After all, student publications, see *Rosenberger*, student group meetings in classrooms, see *Good News Club* and *Widmar*, and nonprofits' use of their tax exemptions, see *Regan*, all happen "within the scope of a government-created program." Under Texas's approach, all those cases would likewise be seen as government speech cases, and government viewpoint discrimination would be allowed in all those contexts.

Thus, for instance, say that a local acting company seeks to put on the play "Inherit the Wind" in a municipally owned theater. This Court has held that, when a city opens a city-owned theater as a venue for a wide range of productions, those municipally owned theaters cannot discriminate based on viewpoint.[4]

Yet if Texas's position were accepted, then the city could deny the group's application and explain, much like the DMV Board did in this case, that,

> [The city] finds it necessary to deny this [group's] application, specifically the ["Inherit the Wind"] portion of the design [displayed

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[4] *See Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975) (striking down exclusion of offensive material from such a theater); *NEA* v. *Finley*, 524 U.S. 569, 586 (1998) (noting that *Conrad* fell within the category of cases that, like *Rosenberger*, barred viewpoint discrimination in government programs that "'encourage a diversity of views from private speakers'" (citing *Rosenberger*, 515 U.S. at 824)).

> on the marquee], because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate[s] ["Inherit the Wind"] with organizations advocating hate directed toward people or groups that is demeaning to those people or groups.

Pet. Br. 6. *See, e.g.*, David Larsen, *The Religious Bigotry of "Inherit the Wind,"* EXAMINER.COM, Oct. 4, 2010, http://www.examiner.com/article/the-religious-bigotry-of-inherit-the-wind (claiming that the film "Inherit the Wind" contains "a continual thread" of "anti-Christian bigotry"). And the government could argue, like it does in this case, that it is legally "allow[ed] * * * to choose the messages and symbols that will appear on its [marquee], and that in all events the Board's decision to reject the [acting company's] proposal was not unconstitutional viewpoint discrimination." Pet. Br. 7.

Yet given this Court's viewpoint neutrality requirement—not only in designated and limited public fora, but also in nonpublic fora—such an exclusion could not be allowed. *See supra* note 4. Neither should it be allowed in the specialty license plate program involved in this case.

II. Texas's specialty license plate program lacks the properties this Court has identified as hallmarks of government speech

To be sure, when the government has viewpoints of its own that it wants to express, it may express those viewpoints instead of others. Indeed, the gov-

ernment could do so within a specialty license plate program, if the government genuinely dictates what is said on those plates. For instance, California's specialty plate program closely resembled Texas's current program until a federal district court enjoined the standardless application process as facially unconstitutional. *See Women's Resource Network* v. *Gourley*, 305 F. Supp. 2d 1145, 1154 (E.D. Cal. 2004). But California has since amended its program to promote only government agencies and government-linked organizations, such as the Coastal Commission, the Yosemite Conservancy, and the California Firefighters' Memorial.[5] The program's minimal options, limited to promoting state programs, show that California is engaging in government speech through its specialty plate program.

This is quite unlike the Texas program, which promotes a wide range of nongovernmental organizations. Indeed, the District Court found that, "by rule and practice," nonprofit groups provide the creative and expressive elements of the design. Pet. App. 57a. The Texas Department of Motor Vehicle Board's "input appears to be limited to (1) technical reformatting of a design to enable it meet visibility, distinctiveness, and reflectivity requirements, and (2) rejecting applications which otherwise do not conform to the various statutory and rule requirements for a specialty plate." *Id.*

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[5] California Dep't of Motor Vehicles, *California Special Interest License Plates*, https://www.dmv.ca.gov/portal/dmv/detail/online/elp/elp (last visited Feb. 1, 2015).

Texas asserts that it "'effectively control[s]' and exercises 'final approval authority' over the design," Pet. Br. 14 (internal citations omitted). But even when the government has final approval authority, a program to promote a diversity of private views may well qualify as a limited public forum. *Rosenberger*, for instance, found that the student publication funding program was a limited public forum, though the University exercised its final approval authority in denying funding to the plaintiffs' magazine, as well as to 17 other groups out of 135 applicants. *Rosenberger*, 515 U.S. at 825.

And in any event, Texas's final approval authority seems more nominal than real, given that Texas had never rejected a design application before this case. Likewise, though Texas claims to reserve the right to reject a design if it "*might* be offensive to *any* member of the public," Tex. Transp. Code § 504.801(c) (emphasis added), Texas has never exercised this right for any license plate other than the Sons of Confederate Veterans' plate. Presumably a plate supporting the Texas Trophy Hunters Association *might* offend *one* of 25 million Texans.[6] The same can be said about the plate that reads "One State Under God" (and bears the image of three crosses) or the plate that reads "Choose Life."[7] This

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[6] *See Anti-Hunting Activists Outraged by Texas Tech Cheerleader*, KCBD, July 1, 2014, http://www.kcbd.com/story/25919760/anti-hunting-activists-outraged-by-texas-tech-cheerleader.

[7] *See DMV Board Vote Diminishes Religious Liberty in Texas*, Texas Freedom Network, http://www.tfn.org/site/News2?page=NewsArticle&id=6677 (Dec. 8, 2011) (arguing that the

general lack of editing, even when a message is sure to offend someone, shows that the DMV views these plates as reflecting personal values, rather than conveying the government's message.

This lack of real selectivity on Texas's part is also one factor, among others, that explains how this case differs from *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460 (2009). As *Summum* rightly noted, "[p]ublic monuments displayed on public property typically represent government speech," and "[g]overnments have long used monuments to speak to the public." *Id.* at 470. Unsurprisingly, then, when it came to choosing what to permanently display on public land, Pleasant Grove exercised "selective receptivity," allowing only those monuments "that portray what [it views] as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture." *Id.* at 471-72.

The monuments that were accepted, therefore, were "meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* And, "because property owners typically do not permit the construction of

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Texas plate featuring the words "One State Under God" and three crosses is "disrespectful" to people of all faiths); *Texas Senate Votes for Choose Life Plate*, Lubbock Avalanche-Journal, May 1, 2009 (reporting that abortion rights groups opposed Texas's proposed "Choose Life" plates); *Abortion Activists Upset Choose Life License Plates Fund Adoption Centers*, LifeNews, http://www.lifenews.com/2013/11/24/abortion-activists-upset-choose-life-license-plates-fund-adoption-centers (Nov. 24, 2013, 8:49 PM) (claiming that a "Choose Life" license plate "infuriates" abortion advocates).

such monuments on their land," "persons who *observe* donated monuments routinely—and reasonably—*interpret* them as conveying some message on the property owner's behalf." *Id.*

Monuments, moreover, have been used by governments to speak to the public "[s]ince ancient times." *Id.* at 470. Because they are permanent fixtures on government land, the government will necessarily select what monuments to display, based on its judgment about what best fits the government land on which they are displayed.[8]

Specialty license plates, on the other hand, are a recent development. They appear on a driver's privately owned car, with the driver choosing what message is to be displayed. In Texas, specialty license plates are approved with very little selection, and with little apparent judgment about what is most appropriate to display on Texans' cars or Texas highways. Thus, the plates cannot reasonably be classified as government speech.

Likewise, the programs in this Court's other leading government speech cases—*Johanns* v. *Live-*

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[8] This does not mean that a government that selects certain monuments necessarily adopts the monuments as its own private speech in all respects. *See Summum*, 555 U.S. at 476-77. The government as curator can select privately created speech on monuments, just as it does in art museums or on stamps, without thereby adopting the private speaker's viewpoint. *See, e.g., Protestants & Other Americans United for Separation of Church & State* v. *Watson*, 407 F.2d 1264 (D.C. Cir. 1968) (rejecting challenge to Postal Service decision to print stamp showing Madonna and Child painting displayed in the government-owned National Gallery).

stock Marketing Ass'n, 544 U.S. 550 (2005), and *Rust* v. *Sullivan*, 500 U.S. 173 (1991)—are worlds apart from the Texas specialty license plate program. In *Johanns*, "the message set out in the beef promotions is from beginning to end the message established by the Federal Government." 544 U.S. at 560. This Court stressed that the Secretary of Agriculture was actively involved in crafting and approving "every word used in every promotional campaign," with every message "reviewed by Department officials both for substance and for wording, and some proposals [were] rejected or rewritten by the Department." *Id.* at 561.

Rust likewise involved a program through which the government was actively promoting its own coherent message. This Court concluded that, "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, 515 U.S. at 833 (describing *Rust*'s holding); *Garcetti* v. *Ceballos*, 547 U.S. 410, 437 (2006) (likewise).

But here, as noted above, there is no "particular policy of its own" that Texas is promoting, *id.*, and no "message established by the [Texas] government," *Johanns*, 544 U.S. at 560. There is only a wide array of private speech, in a program set up to promote "a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834.

In this respect, *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995), is instructive. In *Hurley*, this Court recognized that, when an institution transmits the speech of others, it sometimes creates its own coherent speech product,

but sometimes just facilitates others' speech. (*Hurley* discussed this with regard to private institutions, such as parade organizers and cable networks, but the principle also applies to government institutions.)

In particular, this Court concluded that a parade was a parade organizer's own speech—even though it was composed of the speech of many participants—because, "[a]lthough each parade unit generally identifies itself, each is understood to contribute something to a common theme." *Id.* at 577. But the many channels distributed through a cable system are not viewed as the cable operator's coherent speech product. The cable system merely "consist[s] of individual, unrelated" channels "that happen to be transmitted together for individual selection by members of the audience." *Id.*

The specialty license plate program is unlike the parade organizers' coherent speech product, since the plates are not "understood to contribute something to a common theme." It is more like the cable system, "consist[ing] of individual, unrelated" license plates "that happen to be [distributed by the government] for individual selection by" Texas drivers. The license plate program is therefore not the government's own speech, just as the assembly of all the unrelated cable system channels was not the cable operator's own speech.

III. *Cornelius* v. *NAACP Legal Defense & Education Fund* and *Lehman* v. *City of Shaker Heights* show that viewpoint discrimination is barred even when the government itself physically prints program participants' speech

Nor can this case be properly distinguished from the viewpoint neutrality precedents on the grounds that the government prints and distributes the license plates. (See Pet. Br. 1, which argues that Texas should not be required to "etch[]" an "image onto state-issued license plates.") There is no constitutionally sound reason to distinguish such printing and distribution from furnishing meeting spaces for speech, *Widmar*, 454 U.S. at 268; subsidizing printing of speech, *Rosenberger*, 515 U.S. at 834; or physically hand-delivering speech as part of an interschool mail system, *Perry Educ. Ass'n*, 460 U.S. at 47-49. In all those cases the Court viewed the speech as private speech protected against viewpoint discrimination, rather than as government speech. The same conclusion should apply when the government is providing other valuable services, such as physically printing the license plates.

Indeed, this Court has required viewpoint neutrality even when government-printed messages were involved. This is clearest in *Cornelius*, which involved the Combined Federal Campaign, a program through which federal employees were encouraged to contribute to various charities.

The Office of Personnel Management printed and distributed to federal employees a pamphlet that contained 30-word fundraising statements from various charitable groups. The groups' speech thus ap-

peared in a document composed and printed by the federal government, and distributed on federal property by federal government employees. Yet this Court still concluded that the program had to be viewpoint-neutral. *Cornelius*, 473 U.S. at 806.

Likewise, this Court has held that a city that sells advertising space on city buses has to open up this space on a viewpoint-neutral basis. *R.A.V.*, 505 U.S. at 390 n.6 (describing *Lehman*, 418 U.S. at 303, which involved a city bus advertising program, as allowing "viewpoint-neutral" restrictions "in nonpublic forums"). As *Cornelius* noted, the *Lehman* plurality opinion "treated the advertising spaces on the [city-owned] buses as the [nonpublic] forum." *Cornelius*, 473 U.S. at 801. Any speech restriction in such a nonpublic forum must be viewpoint-neutral. *Id.* at 806, 811. And viewpoint neutrality was required even though the city had to physically display the ads on its buses, and even though the city or its contractors had to physically mount the advertising (and likely print it as well).

Texas's specialty plate program operates much like the print advertising venture in *Lehman*. Texas "sells" ad space to various private interests and generates significant revenue for Texas, estimated at about $170 million through fiscal year 2012.[9] Indeed, if anything, Texas's connection to the speech is even more attenuated than in *Lehman*, because the ads

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[9] Texas Dep't of Motor Vehicles, *Specialty License Plate Revenue Spreadsheet*, http://txdmv.gov/reports-and-data/doc_download/673-specialty-license-plate-revenue (last visited Feb. 11, 2015).

are displayed on private cars rather than city-owned buses.

Texas chose to raise money by making its specialty license program into a forum for private speech. If Texas wants to keep complete discretion over what slogans and symbols can go on Texas license plates, Texas is free to close this forum, and simply stop inviting the public to speak on license plates. But what Texas cannot do—without violating the First Amendment—is open up the forum, reap the financial benefits of creating such a forum, and then still claim a right to discriminate among messages based on viewpoint.

The government could not evade the constraints of viewpoint neutrality when it had to print the message in *Cornelius* or display, mount, and likely print the message in *Lehman*. Likewise, it may not evade the constraints of viewpoint neutrality simply because it has to physically print the design on the specialty license plates.

CONCLUSION

For these reasons, the Texas specialty license plate program (whether treated as a limited public forum or a nonpublic forum) may not discriminate based on viewpoint. The exclusion of the Sons of Confederate Veterans' design should be held to violate the Free Speech Clause. And the judgment of the Court of Appeals should therefore be affirmed.

Respectfully submitted,

Mark Rienzi
Eric Rassbach
The Becket Fund for
Religious Liberty
1200 New Hampshire
Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
mrienzi@becketfund.org
erassbach@becketfund.org

Eugene Volokh
Counsel of Record
Scott & Cyan Banister
Amicus Brief Clinic
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amicus Curiae

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